



Malawi Judiciary

IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NO. 30 OF 2016

(Being Commercial Appeal Case No.s 1 and 2 of 2016)

BETWEEN

POLYPET PACKAGING INDUSTRIESAPPELLANT

AND

O. G. PLASTIC INDUSTRIES (2008) LTD..... RESPONDENT

CORAM: THE HONOURABLE JUSTICE E. B. TWEA, SC, JA
THE HONOURABLE JUSTICE DR J. M. ANSAH, SC JA
THE HONOURABLE JUSTICE A. C. CHIPETA SC JA

Mr Chibwe.. Counsel for the Appellant

Mr Mbeta/MwabunguluCounsel for the Respondent

Mrs ChimtandeRecording Officer

Court: Good morning Counsel.

This is the unanimous ruling on this Court.



RULING

Twea SC, JA

This is a notice of motion brought by the applicant under section 7 (b) of the Supreme Court of Appeal Act. The applicant wants this Court to discharge the order of stay granted by our brother Judge, sitting as a single member of this Court.

The facts of this matter are not really in dispute.

It is on record that the respondent and applicant in this case are manufacturers of plasticware. It is in evidence that in the year 2015, the respondent applied for and registered designs numbers MW/D/2014/00025 and MW/D/2015/00015 for a plastic cup and a basin respectively. The applicant was of the view that the registered designs did not merit registration on the ground that they did not have features which could be termed peculiar to warrant legal protection. The applicant then applied for cancellation of the registered designs. The Deputy Registrar of Registered Designs in his determinations cancelled both registered designs of the respondent and expunged them from the register. Naturally, the respondent was not happy with the determinations, and sought to appeal.

There are allegations that the manner in which the Deputy Registrar of Registered Designs set down the matter challenges the legitimacy of the determinations. The respondent's desire to appeal the determinations, however, was negatively affected by the absence

of the appellate tribunal. The Patents Tribunal, to which the appeal would lie, had not been constituted. The respondent was thereby, apparently, without a remedy.

In the quest to mitigate the situation the respondent filed the appeal in the High Court (Commercial Division) at the Blantyre Registry. The respondent, further, applied for and was granted an injunction against the applicant to stop the applicant from enjoying the fruits of the determinations by the Deputy Registrar of Registered Designs.

When the appeal was called before the Court below, the applicant raised preliminary objections. It contended, among other things, that in the absence of the Patents Tribunal, the Court below was not properly seized of the appeal. The Court below upheld the objections and dismissed the appeal. The injunction too was, consequently, discharged. The Court below declined to give the respondent a stay. The respondent then applied for and was granted a stay by a single judge of this Court.

The present application is to discharge the order for stay before the full Court.

We must mention, at the outset, that this case is highly charged. The affidavits on both sides contain statements that are mostly emotional than factual. Certainly there is no love lost between the parties. However, we commend counsel for conducting themselves professionally in Court.

Coming back to the matter before us, we remind ourselves that this is a re-hearing. We are not obliged to refer to the findings of our brother Judge although we may adopt his views.

We have heard the skeleton arguments of both parties in this Court and read their affidavits. We have also read the skeleton arguments and affidavits which were before our brother Judge, that were referred to us. It is our conclusion, just like the parties and our brother Judge, that there is what we could call a “statutory abeyance”; created by the absence of the Patent Tribunal. The evidence clearly shows that the appointing authority is aware of this default. The question therefore, is what rights do parties have in such circumstances. We agree with our brother Judge that this is best left for the full arguments at appeal. This case may be distinguished, on the facts, from the case of **Patrick B. Kadewere and others v Mota Engil and others Civil Cause No 2573 of 2007 (HC)** Principal Registry. We also agree with the respondent that it would be pre-mature to determine this question now. Therefore whether or not the respondent was properly before the Court below is not for us to decide now. What should concern us however, is how to protect the rights of the parties in such circumstances.

It was clear from the submissions that the parties are serious rivals. They are competing in the same market. The applicant decries the respondent’s attempt to create a monopoly while the respondent decries the applicants intent to whittle away the fruits of its invention. It is important to bear in mind that copyrights are time bound: section 15 of the Registered Designs Act is instructive on this. In this respect, one has to bear in mind the view of Simmond J in the case of **Re Von Kantzow’s Patent [1944] 1. Ch. 318 at page 322** that;

“[...] for, in the creation of any monopoly, the balance must be preserved between the public interest on the one hand and provisions of proper reward for the inventor on the other”.

This is what we have to balance: the rights of consumers to enjoy the benefits of a competitive market and the right of an investor to be rewarded for his invention. During submissions however, the applicant failed to disclose when exactly it commenced production of the plasticware that is alleged to infringe the respondent's copyright. On the other hand the respondent disclosed that they started manufacturing in April and September, 2014, in respect of the cup and the basin, respectively. The applicant did not oppose the respondent's assertion that it started manufacturing the plasticware in issue after 1st April, 2015. The applicant did not aver that it was not aware of the respondent registered designs at all. It started manufacturing its product while aware of the respondent's product on the market. It appears to us that the applicant therefore, was the last entrant on the market. The applicant did not invest in production in order to have a return on its invention, but with a view to gain a share of the market. A discharge of the stay would enable it to exploit the market to the detriment of the invention of the respondent.

For these reasons we agree with Mzikamanda SC JA that:

“[...] in this case the fair and just thing to do is to grant the stay of judgment of the Court below until the determination of the appeal before this Court or until a further order of this Court.”

We accept the respondent argument that the status quo is what obtained after registration of the designs before the applicant started manufacturing its plasticware. It is our order therefore, that the

order of the Court below and consequently the determinations of the Deputy Registrar of the Registered Designs be stayed until the appeal is determined.

Costs will be for the respondent.

Pronounced in open Court this 11th day of August, 2016 at Blantyre.

Signed:

THE HON. JUSTICE E. B. TWEA, SC JA

Signed:

THE HON. JUSTICE DR J. M. ANSAH, SC JA

Signed:

THE HON. JUSTICE A. C. CHIPETA, SC JA